UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

CASCADES CONTAINERBOARD PACKAGING – NIAGARA, A DIVISION OF CASCADES HOLDING US INC.

Cases 03-CA-242367
and **03-CA-243854**
03-CA-248951

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 65, AFL-CIO

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ALJ DECISION

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GENERAL COUNSEL'S ANSWERING BRIEF

Pursuant to Section 102.46(b)(1) of the Board's Rules and Regulations, Counsel for the General Counsel (General Counsel) submits this Answering Brief to the Exceptions filed by Cascades Containerboard Packaging – Niagara, A Division of Cascades Holding US Inc. (Respondent) regarding the Decision of Administrative Law Judge Paul Bogas (ALJ). It is respectfully submitted that in all respects, the findings of the ALJ are appropriate, proper, and fully supported by credible evidence.

I. PRELIMINARY STATEMENT

ALJ Bogas evaluated the evidence reached the inevitable conclusion that Respondent violated the Act precisely as alleged in the Complaint. Accordingly, Respondent violated Section 8(a)(1) of the Act by telling employees it was adjusting the profit-sharing plan because of their decision to unionize. (ALJD 20:35-37).[1] Respondent violated Section 8(a)(1) and (3) of the Act, when it changed its profit plan payments (ALJD 28:18-20) and ceased its past practice of displaying its profits for employees (ALJD 30:7-9) because employee's voted to unionize. Moreover, Respondent failed to notify and bargain with the Union about changing the terms of and amounts provided by the profit plan, (ALJD 27:7-10) and Respondent refused to provide the Union with information it requested regarding this plan (ALJD 31:15-17) in violation of Section 8(a)(1) and (5) of the Act. Additionally, Respondent violated Section 8(a)(1) and (5) of the Act

[1] Citation references shall be designated as follows: references to the ALJ's decision (ALJD __:__) showing the page number first, followed by the line numbers; to the Respondent's Brief as (R. Br. __) where the blank is the page number; to Respondent's Exceptions as (R. Exc. __) where the blank is the numbered exception; to the hearing transcript as (Tr. __) where the blank is the page number; to the General Counsel's Exhibits as (GC Exh. __) where the blank is the exhibit number; to Respondent's Exhibits as (R. Exh. __) where the blank is the exhibit number; and to Joint Exhibits as (J. Exh.__) where the blank is the exhibit number.

when, without adequately notifying or bargaining with the Union, it laid off employees (ALJD 23:9-11) and subcontracted out bargaining unit work (ALJD 25:18-20). As none of Respondent's exceptions are legitimate, the ALJ's error-free decision should be upheld in its entirety.

II. ARGUMENT

Despite the ALJ's well-reasoned decision, Respondent has filed an avalanche of exceptions that are not based on the record or Board law. As the ALJ noted in his decision, Respondent "demonstrates contempt for the Board's processes and authority under federal law." (ALJD 16:34-35). These exceptions appear to reflect that sentiment. Regardless, what follows is an exhaustive catalogued analysis of Respondent's numerous exceptions.

A. Exceptions which have no bearing on any finding should be dismissed (Exception 1-3, 5, 17, 91)

Respondent takes exception to word choice, syntax, and typographical errors. These pedantic exceptions demonstrate Respondent's intent to frustrate the Board's processes. For example, Respondent's first exception complains that, on rare occasion throughout the 35-page decision, the ALJ failed to pluralize the name of Respondent's controlling company, calling it "Cascade Inc." instead of "Cascade**s** Inc. [emphasis added]." (R. Exc. 1, 17). Indeed, in the testimony of its own human resources manager, Joseph Zilbauer, he refers to "the head office" as "Cascad**e** Inc. [emphasis added]." (Tr. 421). If indeed the transcript is in error, correcting this clear clerical mistake has no impact on the ALJ's ultimate findings nor does taking an exception to it demonstrate anything other than Respondent's distaste for the Board.

Respondent also excepts to the use of the words "immediately" and "abruptly ceased" as descriptors for Respondent's actions following the Union campaign. (R. Exc. 3 and 5). Not only

does Respondent miscite[2] where these qualifiers occur in the decision, they are taken out of context. Indeed, the next sentence of the decision provides a framework for the comment, stating that merely 8 days after certification Respondent informed the Union about impending layoffs. (ALJD 3:8-10). The ALJ goes to great lengths throughout the decision to expound on the dates that certain actions were taken; accordingly, such objections to descriptive word choice is immaterial.

Respondent also objects to the ALJ's use of the adjective "massive" in relation to the mill area of the facility that the unit janitor was required to clean before Respondent unlawfully subcontracted out that work. (R. Exc. 91). This descriptor is appropriate as the record makes clear the production and maintenance area cleaned by the unit janitor was much larger than the office area and included most of the Niagara Falls facility such as the bathrooms, locker rooms, showers, labs, and lunchrooms. (Tr. 181-83, 226, 370, 407, 455-56). Indeed, "massive" is the precise word used by the witness when describing the area. (Tr. 455). Respondent complains about this word choice but does not present alternative facts from the record to challenge the selection. Such expository language, again, is based on the facts in the record. As Respondent fails to state why such a word is legally or factually inappropriate this exception should be dismissed.

Similarly, Respondent excepts to the concept that "employees initiated a union organizing campaign at Respondent's facility." (R. Exc. 2). Respondent gives no additional context in its brief to this gripe[3] but given that there is no dispute over the unit's certification, the only reasonable

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[2] Respondent's exceptions claim that the decision "finds" that "the Complaint focuses on actions occurring 'immediately' after the Union's organizing campaign" as ALJD 3:26-27 when a similar statement occurs in ALJD 3:**6**-7.

[3] Given that Respondent fails to state why this statement is exceptionable it violates Section 102.46(b)(1) of the Board's Rules and Regulations and should also be dismissed on that account.

interpretation of this exception is one of syntax. There is no evidence that anyone other than the employees initiated the campaign. Moreover, whoever "initiated" the campaign is not directly relevant. These trivial exceptions which, if changed, would have no bearing on the ultimate conclusions reached in the decision should be dismissed.

B. The ALJ made sound credibility determinations that should not be overturned (Exceptions 10, 38-39, 41, 44, 45, 90

Respondent takes general exceptions to the ALJ's credibility determinations about Respondent's witness General Manager Normand Laporte, though it does not support those in its brief.[4] When considering contradictory testimony during a hearing, an administrative law judge is entitled to make appropriate credibility determinations. The Board allows ALJs to make "demeanor-based" credibility determinations based on "nervousness of the witness, self-contradiction and evasiveness" while testifying. Atlantic Veal & Lamb, Inc., 342 NLRB 418, 421 (2004). ALJs can also make credibility determinations "based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole." Shen Lincoln-Mercury-Mitsubishi, Inc., 321 NLRB 586, 589 (1996), citing Panelrama Centers, 296 NLRB 711, fn. 1 (1989); see also Northridge Knitting Mills, Inc., 223 NLRB 230, 235 (1976). Credibility determinations are afforded great deference because the judge "sees the witnesses and hears them testify, while the Board and reviewing court only look at the cold records." NLRB v. Walton Mfg. Co., 369 NLRB 404, 408 (1962); see also USPS, 365 NLRB No. 51, slip. op. at 1, fn. 1 (2017).

[4] Given that Respondent fails to state why the ALJ's credibility determinations are exceptionable other than one broad statement that "contrary to the Judge's assertion, both Laporte and Zilbauer offered credible, unrebutted testimony that the Respondent did not possess information about the profit-sharing plan or formula" it violates Section 102.46(b)(1) of the Board's Rules and Regulations and should also be dismissed on that account. (R. Br. 26).

Here, the ALJ made appropriate credibility determinations regarding Laporte. The decision accurately reflects the facts found in the record. The following is just one example of Laporte's evasiveness and willingness to directly contradict his testimony under oath:

> ALJ BOGAS: Have you ever asked for profit information?
> LAPORTE: No, sir.
> ALJ BOGAS: From any other entity outside of your immediate facility?
> LAPORTE: Maybe I did ask for information, but it's a guesstimation of profit, it's not an accurate information from [the] company.

(Tr. 382). Similarly, under targeted questioning from the ALJ about receiving profit information about the mill, Laporte testified to the following:

> ALJ BOGAS: Okay. So you operate now without profit information about your facility?
> LAPORTE: Yes, sir; yes, sir.

(Tr. 381). Yet, minutes later when led under redirect examination on the same subject by Respondent counsel, LaPorte testified that he had not answered what was directly being asked of him by the ALJ, but rather, something broader. (Tr. 383-84). This "clarification" from counsel led him to entirely changing his answer under re-cross examination:

> GC COUNSEL: So do you get profit information for your mill?
> LAPORTE: Yes, sir.

(Tr. 384). Such blatant disregard for testifying truthfully under oath, along with the subjective demeanor observations the ALJ describes, is a reasonable basis for the ALJ's determination to discredit Laporte and any exceptions based on these credibility determinations should be dismissed.

C. The ALJ's rulings on motions were proper (Exceptions 47-48, 50-52, 54-55, 57-81, 87, 146, 168)

Over a quarter of Respondent's exceptions address the ALJ's rulings on motions that were made throughout the hearing. These include denying Respondent's motion to dismiss portions of

the complaint, as well as the General Counsel's motion for an adverse inference when Respondent refused to comply with the General Counsel's subpoena. As discussed extensively below, the ALJ's rulings were appropriate.

Respondent's contention that "despite the Judge's best efforts, he is unable to salvage the woefully inadequate record left to him by the General Counsel on the subject of the alleged change to the profit-sharing plan payments to employees" is ironic given that Respondent's failure to produce the subpoenaed records caused the issues Respondent now objects to. (R. Br. 28). While the General Counsel was able to provide testimony to fully support the allegations, it admittedly lacked documentation; solely because of Respondent's contemptuous refusal to comply with the General Counsel's timely and relevant trial subpoena. This issue of an "inadequate record" is the primary basis for Respondent's exceptions regarding its motions to dismiss. (R. Exc. 52, 168).

However, despite Respondent's refusal to comply with the profit-sharing plan information subpoenaed by the General Counsel, the evidence demonstrates that Respondent violated the Act. The General Counsel had three witnesses testify to the change in the profit-sharing plan and a decrease in the payments received. (Tr. 142, 154-56, 176, 179-80, 197-98, 220-21, 234). These witnesses, which were all fully credited by the ALJ, testified that in their individual meetings regarding their twice-annual profit-sharing payment with production supervisor Robert Pozzobon, he told them that the plan and payment were being adjusted. (Compare R. Exc. 47-48, 146 with Tr. 142, 154, 220-21, 234, 179, 197). When asked why, he repeatedly blamed the Union. (Tr. 142, 154-56, 179, 198). Respondent's human resources manager Joseph Zilbauer even identified union activity as the reason for the change to the employees' profit-sharing plan. (Tr. 426, 466-67). Importantly, Respondent failed to present any testimony or evidence that the payments or plan had not been changed. (R. Exc. 50). The ALJ appropriately relied on this testimony to conclude that,

even absent his adverse inference, the General Counsel met its burden and dismissing this portion of the complaint would have been inappropriate. (ALJD 17:6-15).

During the hearing, the ALJ reserved his ruling on the General Counsel's request for an adverse inference against Respondent for its refusal to produce records pursuant to relevant profit-sharing plan subpoena requests. Respondent takes many exceptions to this finding. These exceptions include: 1) that the information was not "properly sought" by General Counsel (R. Exc. 54), 2) Respondent's failure to produce the records (R. Exc. 55, 57-58), and 3) that an adverse inference was imposed. (R. Exc. 59-81, 87). In a footnote, Respondent even argues that the ALJ did not have the authority to impose this sanction. (R. Br. 19, fn. 16).

The Board has consistently held that "[a] party who simply ignores a subpoena pending a ruling on a petition to revoke does so at his or her peril." McAllister Towing & Transportation, 341 NLRB 394, 396-97 (2004) (upholding ALJ's imposition of evidentiary sanctions against the respondent for failing to substantially comply with the subpoenas upon issuance of the judge's order partially denying its petition to revoke), enfd. 156 Fed. Appx. 386, 388 (2d Cir. 2005); see also, San Luis Trucking, 352 NLRB 211, 212 (2008), reaffd. 356 NLRB 168 (2010) enfd. without addressing the sanctions issue 479 Fed. Appx. 743 (9th Cir. 2012), Perdue Farms Inc. v. NLRB, 144 F.3d 830, 834 (D.C. Cir. 1998). Indeed, in this case Respondent failed to produce the documents defying the ALJ's direction to do so. (R. Exc. 55, 57-58; Tr. 16-17).

An ALJ has not overstepped his bounds when drawing an adverse inference. This sanction is one of many available he can impose when a failure to produce subpoenaed records has occurred, since this failure implies that the records would not have supported respondent's position. Shamrock Foods Co., 366 NLRB No. 117, slip op. at 1 n. 1, and 15 n. 29 (2018), enfd. per curiam 779 Fed. Appx. 752 (D.C. Cir. July 12, 2019); Sparks Restaurant, 366 NLRB No. 97, slip op. at

9-10 (2018); Metro-West Ambulance Service, 360 NLRB 1029, 1030 and n. 13 (2014); Essex Valley Visiting Nurses Assn., 352 NLRB 427, 441–44 (2008), reaffd. 356 NLRB 146 (2010), enfd. 455 Fed. Appx. 5 (D.C. Cir. 2012). Among its most comical arguments,[5] Respondent even obtusely claimed that some provision of Quebec provincial law (which it failed to identify at the hearing but finally does in this brief) prevented it from turning over the records. (R. Exc. 60, 65-71; R. Br. 22). As the ALJ discusses in the decision, the U.S. Supreme Court has addressed and rejected such a defense. (ALJD 15: fn.18).

After arguing extensively without success that it did not have to produce the records, Respondent suddenly[6] switched tactics and declared it did not have the documents, presumably to prove a "satisfactory explanation" for its failure and thereby avoid an adverse inference. (R. Exc. 62, 64, 72-75). See, e.g., Shamrock Foods Co., above, slip op. at 1 n. 1, and 9 n. 8 (arguing documents were not in the charging party union's possession or control). However, unlike cases such as Champ Corp., 291 NLRB 803 (1988) enfd. 933 F.2d 688 (9th Cir. 1990), cert. denied 502 U.S. 957 (1991), Respondent failed to present any credible testimony concerning its good faith but unsuccessful attempts at retrieving the documents. Instead, as the ALJ recounts in the decision:

[5] To the extent that Respondent argues that the profit-sharing payments were "gifts" and therefore it wasn't obligated to respond to the subpoena, Respondent's gift argument is addressed extensively later. (R. Exc. 61; see infra Part II.F.2).

[6] Respondent now claims this was not a new argument. However, it was noticeably absent from its petition to revoke. (Tr. 25; R. Exh. 1).

> The Respondent's counsel did not call a custodian of records to substantiate that the Respondent either searched its own records for, or sought unsuccessfully to obtain from within the Cascade[s] organization, the relevant profit-sharing information that I directed it to produce [footnote omitted]. Even more disturbing is the fact that Respondent's counsel failed to present the testimony of the custodian of records after assuring me it would do so. Tr. 255. In the end, there was no record evidence that the Respondent made any search at all for the highly relevant information that was properly subpoenaed by the General Counsel and which I directed the Respondent to provide.

(ALJD 16:26-33; R. Exc. 76-77). Thus, the ALJ appropriately used his authority to impose evidentiary sanctions against Respondent for failing to comply with the General Counsel's subpoena. The ALJ appropriately overruled Respondent's motion to dismiss the Complaint and likewise these exceptions should also be dismissed.

D. The ALJ correctly determined that Respondent violated Section 8(a)(1) of the Act when it blamed the Union for the change it made to the profit-sharing plan (Exceptions 4, 19-28, 94-96)

The ALJ found numerous violations relating to Respondent's profit-sharing payment plan. The ALJ found that Respondent's coercive statements to employees that the Union was the reason for the reduction of their payments violates Section 8(a)(1) of the Act. In addition, these coercive statements partially form the basis for the ALJ's animus conclusions. In objecting to the ALJ's determinations, Respondent takes some broad exceptions to the ALJ's factual findings (R. Exc. 4, 19-28, 94) as well as taking two equally broad exceptions to the law the ALJ applied to reach his conclusions (R. Exc. 95, 96). All these exceptions fail to find a foothold in the record or applicable law. Thus, they should be dismissed.

1. *The ALJ made factual findings based on the credible record evidence (Exceptions 4, 19-28, 94)*

The General Counsel presented witnesses to testify to what they were told about the changes to the profit-sharing plan. Respondent excepts, repeatedly, to the concept that the ALJ

credited these witnesses and that Respondent told these witnesses that their profit-sharing payments were being changed due to the advent of the Union at Respondent's facility. (R. Exc. 4, 19-28, 94). However, that is precisely what the record establishes.

Three employee witnesses testified that production supervisor Robert Pozzobon told them that Respondent was adjusting the profit-sharing payments. When asked why the change was made, Pozzobon unabashedly told them that it was because the employees elected the Union. (Compare R. Exc. 4, 19, 21, 94 with Tr. 142, 154-56, 179, 198, 220-21, 234). The concept of this meeting was not new, in fact, employees were used to attending such a meeting before receiving their payment. Historically, the supervisor read a standard letter from either Cascades or Respondent about recent company performance and then the employees received a typewritten letter detailing Respondent's profits, the amount of the payment, and a signed thank-you note from upper management. (Tr. 140-41, 175; GC. Exh. 21, 22). This however changed during the meetings employees attended before receiving their June 2019 payment.

Specifically, Pozzobon met with unit employee Cracknell in his office. (Tr. 140, 287). Cracknell expected, as in years past, to receive a document detailing Respondent's profits and the amount he would receive in the form of a profit-sharing payment. (Tr. 141). Instead, Pozzobon read from a handwritten letter, and told him that "due to the current situation in Niagara Falls…[the] profit share was being adjusted." (Tr. 142, 154). Cracknell asked Pozzobon what he meant by "the situation" and Pozzobon succinctly replied "the Union." (Compare R. Exc. 22, 27 with Tr. 142, 154-56).

Similarly, unit employee Butski met with Pozzobon about his profit-sharing payment information. (Tr. 176). During this meeting, Pozzobon read from a handwritten letter and told Butski that "due to the current culture of the Niagara Falls mill, we were forced to reduce your

profit-sharing check." Butski asked Pozzobon what he meant by "current culture." (Tr. 179, 197). Again, Pozzobon plainly stated "I would say its because of the Union." (Compare R. Exc. 23-25 with Tr. 179).

A third unit employee testified to his meeting with Pozzobon, which went similarly to that of Butski and Cracknell. Employee Reed recalled Pozzobon telling him that "there's been an adjustment to [the] profit sharing check due to the current situation at the Niagara Falls mill." (Tr. 220-21, 234). Unlike his colleagues, Reed didn't ask what "the current situation" meant, because it was clear to him that the only new situation was the Union. (R. Exc. 28). Instead, he asked if other mills were affected, and Pozzobon said no. (Tr. 220-21). The employees were denied a copy of the payment information, though they had always been provided such information before the Union was elected. (Compare R. Exc. 20 with Tr. 142, 221).

Pozzobon provided vague and leading testimony regarding his meetings with employees. Even still, he admitted that he told 15-20 employees that the profit-sharing checks were affected by the "current situation" at the mill. (Compare R. Exc. 26 with Tr. 287-88, 290, 295). Pozzobon's testimony, coupled with the explanations he gave to Butski and Cracknell about the situation being "the union", demonstrates that Respondent was blaming the Union for its unlawful actions.

Given Respondent's resistance to complying with the General Counsel's subpoena requests (See supra Part II.C), it should be unsurprising that Respondent refused to turn over the new handwritten letter Pozzobon and other management officials read to employees during these profit-sharing meetings. (Tr. 293, 295-96). This handwritten letter deviated from Respondent's past practice and would likely have bolstered the unit employee's testimony about Pozzobon's unlawful statements.

Accordingly, Respondent's exceptions to these facts have no basis in the record and should be dismissed.

2. *The ALJ applied the applicable law to reach his conclusions (Exceptions 95, 96)*

In addition to the facts it disputes, Respondent is dissatisfied with the Board law the ALJ used to reach his conclusions. Namely, Respondent disapproves of the ALJ's finding that "a reasonable employee would tend to be coerced" by Respondent's statements (R. Exc. 95) and that the Board found a violation in "analogous cases." (R. Exc. 96). The ALJ used the applicable law to support his finding that Respondent violated the Act. Accordingly, these exceptions should be dismissed.

First, Respondent apparently criticizes the ALJ's use of the phrase "reasonable employee." However, that is the objective standard by which 8(a)(1) statements are measured. Indeed, a quick search of the phrase in past Board decisions produces seemingly infinite cases. Ultimately, it is well-established that the test for 8(a)(1) statements is, "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." NLRB v. Illinois Tool Works, 153 F.2d 811, 814 (7th Cir. 1946). This test is an objective one and does not rely on the subjective question of whether an employee felt coerced. Multi-Ad Services, 331 NLRB 1226, 1227-28 (2000) enfd. 255 F.3d 363 (7th Cir. 2001). Though Respondent objects to this standard in its exceptions, it fails to make any such argument in its brief. (Compare R. Exc. 95 with R. Br. 16-19). As the Board has consistently upheld the use of the "reasonable employee" test, the ALJ is right to use it when testing the coerciveness of Pozzobon's statements.

Likewise, the ALJ cited appropriate law when analyzing analogous cases. (R. Exc. 96). For example, the ALJ's reliance on Holland America Wafer Co. 260 NLRB 267 (1982) was entirely

appropriate. As the ALJ explains, in that case the Board found that telling employees it was withholding wage increases because they voted for the Union was unlawful. (ALJD 20: 26-30). Holland America Wafer Co. 260 NLRB at 271-72. Similarly, the ALJ properly cited the Board's finding in Gorman Machine Corp., where the Board held that telling employees that their overtime was being eliminated because they had voted for union representation was unlawfully coercive. Gorman Machine Corp., 257 NLRB 51, 58-59 (1981) enfd. in relevant part by 682 F.2d 11 (1st Cir. 1982). Nothing in the ALJs use of either decision was factually or legally incorrect. Again, Respondent's brief ignores its "analogous case" exception entirely. (Compare R. Exc. 96 with R. Br. 16-19). Indeed, the analogous cases the ALJ cites, supports the conclusion that Pozzobon's statements to employees, i.e. that Respondent changed the profit-sharing plan to employee's detriment because of the new union presence at the mill, violated Section 8(a)(1) of the Act. For the foregoing reasons Respondent's exceptions on this topic should be dismissed.

E. The ALJ properly determined that Respondent's decision to withhold the profit information from its employees violated Section 8(a)(1) and (3) of the Act (Exceptions 6, 29-37, 40, 42-43, 46, 152-67)

Another violation related to the profit-sharing payment plan comes from Respondent's decision to, contrary to its past practice, withhold profit information from its employees. Respondent's exceptions to this violation can be organized into three categories: 1) supposed factual disputes (R. Exc. 6, 29-37, 40, 42-43, 46, 152-53, 160, 162, 164, 166), 2) the ALJ's animus determinations (R. Exc. 154-57, 163), and 3) Respondent's flyer defense (R. Exc. 158-59, 161, 163, 165, 167). The credible evidence and relevant Board law support the ALJ's findings, and thus, these exceptions should be dismissed.

1. *Respondent's sweeping factual exceptions are belied by the record (Exceptions 6, 29-37, 40, 42-43, 46, 152-53 160, 162, 166)*

Respondent takes many exceptions to the facts underlying the ALJ's determination that it violated the Act when it ceased sharing profit information with employees. (R. Exc. 6, 29-37, 40, 42-43, 46, 152-53, 160, 162, 164, 166). These exceptions are repetitive and unsubstantiated by the credible record evidence.

Exceptions 6, 29-30, and 153 all object to the ALJ's determination that employees used the monthly profit information to estimate their profit-sharing payments. Indeed, this is the only logical conclusion that can be reached when employees specifically testified to having used the information for exactly that purpose. (Tr. 135, 153, 169-70, 214). Employee Butski testified that he used the profit information to estimate his payment:

> GC COUNSEL: Okay. How, specifically, do you ballpark it? What do you do?
>
> BUTSKI: Well, you can see. Well, I used to go into the controller's office. She would post the properties every month on her white board in her office. And you can go on what you made the prior month, so you kind of -- and then they'll see the totals, and you can add them up yourself. Or I don't know if she added them up herself, but you can add them up and then you can see what the profit was for the past six months.

(Tr. 170). As did employee Cracknell:

> GC COUNSEL: Okay. Do you -- do you know how -- what specifically was written on it, like, how many months of profit information was written on the board?
>
> CRACKNELL: Not offhand. I mean, but like, we would just look for what we made that month and then we would know to add them up.

(Tr. 135). Not only did employees use the profit information Respondent posted to its white board, but they also used the information provided to them orally by management. (Tr. 134-35, 152-54, 170-71, 212, 214-17, 353). Respondent was unable to contradict this testimony and demonstrate,

with evidence, that employees did not use the monthly profit information to estimate their profit-sharing plan payments. Thus, the ALJ relied on the facts in the record to determine that employees used the monthly profit information to estimate their profit-sharing payments and these exceptions should be dismissed.

Similarly, Respondent repeatedly excepts to facts related to the flyer. (R. Exc. 31-35, 160, 162, 166). However, contrary to Respondent's assertions, the flyer clearly expressed "skepticism about Laporte's academic history." (R. Exc. 31; ALJD 9:10-12). The flyer itself has a section on Laporte's "Education" in which it questions his completion of a minor without a major from Canadian universities. (R. Exc. 31; R. Exh. 6). Those comments demonstrate skepticism. And, again contrary to Respondent's assertions, the flyer never clams that Laporte owns either residence it lists. (R. Exc. 32, 162; R. Exh. 6). Rather, it lists the publicly available estimated value of Laporte's current and former residences, even providing citations for the information. (R. Exh. 6).

No one ever claimed responsibility for the flyer and the flyer itself does not list a creator. (R. Exh. 6). Respondent neither investigated the identity of its creator (Tr. 347, 374-75), nor have any basis to conclude it was the Union. (R. Exc. 33, 34, 166; R. Exh. 6). In fact, the record is devoid of any evidence that the flyer came from the Union. (R. Exc. 160). Respondent's argument that "the Union didn't deny making it so they must have made it" is unsupported by any evidence. (R. Br. 44, fn. 43). In a footnote, Respondent describes the ALJ's finding that Respondent had no evidence that the flyer came from the Union as "laughably naïve and unsupported by the record." (R. Br. 44, fn 43). Yet, Respondent cites transcript pages which neither support its contention that the flyer came from the Union nor that unit members knew the Union made the flyer. (R. Br. 44, fn 43, incorrectly citing Tr. 235). For these reasons exceptions 31-35 must be dismissed.

Respondent excepts, in duplicate, to the ALJ's finding that the April 29, 2019 memorandum did not direct Laporte to stop sharing profit-plan information with employees. (R. Exc. 36-37). Respondent claims that the ALJ's finding in this regard must be a result of a communication error between Laporte and the ALJ because Laporte's native language is French. (R. Br. 42, fn. 40). However, Laporte testified competently in English without any request or apparent need for a translator. And, when questioned by Respondent's counsel about whether there is "a connection of some kind between Respondent Exhibit Number 5 and Respondent Exhibit Number 6" he replied, "yes sir." (Tr. 352). And went on to explain how:

> I would say at the end of this memo, as you can see, Your Honor. It said here that it is concerning to us how the Union is taking sensitive information and using it to put together an adversarial complaint including personal attacks. So their company decided -- again, it's not my decision. It's not on my level. So we -- the Company decided that until now -- until further, there will be no communication regarding sensitive and private information to the employees.

(Tr. 352-53). In fact, when asked again a few moments later by Respondent's counsel why the sharing of the profit-sharing plan information was discontinued he said, "because of what we just talked about, sir." (Tr. 353). There is no confusion. There is no language barrier. Laporte testified plainly that Respondent's fifth exhibit, the April 29, 2019 memorandum, prevented him from communicating profit-sharing and profit information with employees. (R. Exh. 5). As a result, the ALJ was within his authority to conclude that the memorandum did not give the directive that Laporte claims it gave.

Likewise, Respondent's exception that the ALJ found "that 'within days' of the election Respondent ceased its longstanding practice of displaying and sharing monthly profit information for the Niagara facility" is based on the record evidence. (R. Exc. 152). As demonstrated above, Respondent itself linked the April 29, 2019 memo with the cessation of sharing monthly profit

information. (Tr. 352-53). There is no dispute that the union election was held April 26, 2019. (ALJD 2:47). The April 29, 2019 memorandum that Laporte interpreted as requiring him to stop sharing monthly profit information is certainly "within days" of the April 26 election. (R. Exh. 5).

Respondent also disagrees with the ALJ's determination that Laporte claims he never asked for the facility's profit information. (R. Exc. 43). Laporte contradicted himself repeatedly about whether he asked for the facility's profit information or not; in fact, this is one of the reasons the ALJ discredits him. (See supra Part II.B). In discrediting this witness, the ALJ is within his authority to conclude that as Respondent's general manager who is responsible for managing sales, accounting, and production (Tr. 313), it is implausible that Laporte did not have access to profit information (R. Ex. 42). Similarly, it is appropriate for the ALJ to conclude that because Laporte told his superiors, without any evidence, that the Union created the flyer he was ultimately responsible for the cessation of the practice of sharing monthly profit information with employees. (Tr. 352; R. Exc. 40, 46).

For the foregoing reasons, Respondent's exceptions to the facts about the cessation of sharing monthly profit information with employees should be dismissed.

2. *The ALJ made appropriate findings of animus (Exceptions 154-57, 163-64, 167)*

In addition to its numerous factual disputes, Respondent takes umbrage with the ALJ's finding of animus. It objects to the fact that animus was established at all (R. Exc. 154, 157), that the April 29, 2019 memorandum established animus (R. Exc. 155), that the credited 8(a)(1) statement to Cracknell blaming a "third party" established animus (R. Exc. 156), and that the flyer demonstrated animus (R. Exc. 163-64, 167). Respondent's own exceptions highlight the animus it claims doesn't exist.

Laporte's actions and testimony support a finding of animus. Laporte testified openly that he does not like unions and that he immediately blamed the Union for the flyer when it emerged, despite making no effort to investigate its origins. (Compare R. Exc. 163-64, 167 with Tr. 347-49, 352, 374-76). Laporte's statement to Cracknell that the involvement of a "third-party" prevented Respondent from sharing profit information fully supports a finding of animus and can be interpreted no other way. (R. Exc. 156; Tr. 151). Similarly, Laporte's statement to Reed that the Union could not be trusted with important information also supports a finding of animus. (Tr. 224).

The April 29, 2019 memorandum also supports a finding of animus. Respondent made the decision to stop sharing profit information with employees on April 29, three days after the election. (R. Exc. 155; R. Exh. 6). Independent of timing, Respondent even admitted that its decision to stop posting profit information was related to the Union election. (R. Exh. 6). In its April 29, 2019 memorandum, Respondent specifically informed employees that it was "disappointed" in their decision to elect the Union and that it, therefore, would likely no longer be providing profit sharing information with employees. (R. Exc. 155; R. Exh. 6).

Moreover, it has already been established that Pozzobon told employees specifically that the Union was to blame for the change in the profit-sharing plan. (See supra Part II.D.1). There can be no question that Respondent's decision to stop sharing monthly profit information with employees was a direct result of the animus Respondent harbored toward the Union. Respondent's own timing, exhibits, and witnesses admitted as much. (Tr. 136, 142, 150-152, 154, 179, 197, 220-21, 224-25, 234-36, 287-88, 291-92, 295; R. Ex. 6). As such, these exceptions should be dismissed.

3. *The ALJ properly rejected Respondent's defense that it stopped sharing the profit information with employees because of a flyer it assumed came from the Union (Exceptions 158-59, 161, 165)*

Finally, the ALJ correctly rejected Respondent's defense that the flyer was so egregious that it was legally permitted to stop sharing profit information with employees. Respondent spends

several exceptions arguing that if it was a Union flyer (as Respondent contends) that the flyer was not protected activity (R. Exc. 159, 161) and that the flyer gave Respondent every right to limit sharing profit information (R. Exc. 158, 165). Unsurprisingly, Respondent's contentions are unsupported by relevant Board law.

Contrary to Respondent's assertions, if the flyer was created by the Union or related to the Union campaign then it would constitute protected activity. Ultimately, this point is moot because there is no evidence that the Union created the flyer. (See supra Part II.E.3). Regardless, if the flyer was a "Union" flyer, then it enjoys protection under the Act as its content is not egregious as to forfeit that protection. Compare Valley Hospital, 351 NLRB 1250, 1252 (2007), enfd. 358 Fed. Appx. 783 (9th Cir. 2009) (malicious or reckless disparaging statements may lose protection of the Act) with Mount Desert Island Hospital, 259 NLRB 589, 589 fn.1 and 593 (1981), affd. in relevant part and remanded 695 F.2d 634 (1st Cir. 1982) (employees may use "intemperate, abusive, or insulting language without fear of restraint or penalty" when engaging in protected activity). (ALJD 29:fn 28). As the ALJ indicates, nothing in the flyer was sufficiently reckless or malicious untrue as to lose the Act's protection. (ALJD 29:fn 28).

As the ALJ correctly found, Respondent had no right to limit the information it provided to employees because of the flyer. First, the flyer contained no proprietary or confidential information. Everything listed was publicly available and no assertions have been made to the contrary. (R. Exh. 6; ALJD 10:21-27). Nor did the content of the flyer relate in any way with the profit information that had historically been shared with employees. (R. Exh. 6; ALJD 10:26-27). The only connection between the flyer, the Union, and the profit information was one that Respondent fabricated to justify its unlawful activity. More importantly, if the flyer was a Union

flyer then it constituted protected activity and Respondent changing its past practice in response to the flyer violates the Act.

For the foregoing reasons, Respondent's exceptions to the facts, animus findings, and defenses regarding its cessation of sharing profit and profit-sharing plan information with employees should be dismissed.

F. The ALJ correctly determined that Respondent violated Section 8(a)(1), (3) and (5) of the Act when it changed the terms of its profit-sharing plan (Exceptions 11-16, 18, 49, 53, 56, 82-86, 88-89, 126, 128-41, 143-45, 147-50)

Again, the ALJ properly found violations relating to Respondent's profit-sharing payment plan. In this case that Respondent changed its profit-sharing payment plan. In doing so, it violated Section 8(a)(5) of the Act when it failed to notify or bargain with the Union about the change. Respondent also violated Section 8(a)(3) of the Act when it took that action in retaliation for employees voting to unionize.

Respondent bases its exceptions on: 1) allegedly misinterpreted facts (R. Exc. 11-16, 18, 49, 53, 56, 82-86, 88-89, 126, 128-30, 134, 139), 2) the ALJ's rejection of its argument about the profit-sharing plan being a "gift" to employees rather than terms and conditions of their employment (R. Exc. 131-33, 135-39), 3) the ALJ's rejection of Respondent's defense that it was not responsible for making changes to the plan (R. Exc. 140-41), and 4) that there was no anti-union animus (R. Exc. 143-45, 147-50). The ALJ's foundation for these conclusions is the credible record evidence and relevant Board law. For those reasons, the exceptions must be dismissed.

1. *The facts support the ALJ's conclusion that Respondent unlawfully changed the terms of its profit-sharing payment plan (Exceptions 11-16, 18, 49, 53, 56, 82-86, 88-89, 126, 128-30, 134, 139)*

Respondent excepts to many facts about the changes it made to the profit-sharing payment plan. Unfortunately for Respondent, the ALJ consistently relied on the record when determining

the truth from the facts presented. As all the facts are well-supported by the record, Respondent's exceptions must fail.

Respondent excepts to the ALJ's finding that for over twenty years Respondent has made twice annual profit-sharing plan payments to employees. (R. Exc. 11). In its brief, Respondent concedes that these payments have occurred for over twenty years. (R. Br. 31, fn 30). However, Respondent argues that the ALJ incorrectly attributed these payments as being from Respondent rather than from its parent company, Cascades, Inc. (R. Br. 31). Respondent relies on Laporte's testimony to justify its position but fails to acknowledge that the ALJ extensively discredited Laporte. (See supra Part II.B). Indeed, the portions of the transcript Respondent cites for support were specifically used to discredit the witness. (See e.g., Tr. 382). Moreover, Respondent is conflating two issues with this inaccurate citation. As even Respondent argues, profit information (which is what is being discussed on Tr. 382) is not the same as the profit-sharing plan payment information, which is what this fact addresses. As detailed below, Respondent had a critical role in determining the size of the payments. Thus, this exception should be dismissed.

Respondent also excepts to the ALJ's findings about how the payments were calculated and what employees were told about payment calculations. (R. Exc. 12-15, 134). Contrary to Respondent's contentions (R. Exc. 12), the record reveals that Respondent calculates the payments based on "variable" factors including profits and "other compensation" employees received. The record demonstrates that the size of the payments is based on Respondent's profits and profitability, in addition to employee years of service, hourly wage, and hours worked in the past six months. (Tr. 132-33, 146, 150, 153, 167, 169, 193, 210, 485). As the ALJ appropriately states, these "employment related factors" form the basis for the size of employee payments. (R. Exc. 139). The record reflects that Respondent held town-hall style meetings to inform employees of

the amount of profits it held in a pool for distribution which changed over the years. (Compare R. Exc. 13, 15 with Tr. 146-49, 167-68, 194, 210-11, 213-14, 237-38).

As Respondent's human resources manager Joseph Zilbauer testified, Respondent considers the profit-sharing plan a "gift" to employees, contrary to Respondent's assertions. (R. Exc. 16). Specifically, when asked to discuss the "profiteering" section of Respondent's "production working conditions" document, Zilbauer replied in relevant part, "It means specifically that profiteering is a gift, it's not guaranteed." (Tr. 419). He repeats the sentiment later when asked what he would tell new employees about the profiteering plan. (Tr. 421). Respondent even excepts to the ALJ's finding that "Zilbauer would check employees' earnings to ensure that profit-sharing payments were based on the correct information." (R. Exc. 14, 18, 83-85). This information was elicited *by Respondent* in direct testimony when Zilbauer stated:

> So my role would be to -- to validate information in a file that we received from corporate that relates to employees' eligible earnings, validate the employees who are -- who are listed to make sure that -- that there's no one missing. Make sure that no one who should not get profit sharing is in the file. There – there's a bunch of validations you -- you -- I have responsibility for as it relates to my employees.

(Tr. 425). Through this testimony Zilbauer conceded that Respondent had a role[7] in determining the size of the profit-sharing payments. (Compare R. Exc. 14, 18, 83-85 with Tr. 425).

Respondent also excepts to the ALJ's finding that Zilbauer knew that the profit-sharing payment plan was changing but failed to notify the Union. (R. Exc. 53). However, that is precisely what the record reveals. On cross-examination Zilbauer testified:

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[7] Respondent even has the audacity to take exception to the ALJ's statement that "*Respondent argued* that profit-sharing plan payments were made with 'no involvement' by Respondent. (R. Exc. 130 emphasis added). This is *precisely* Respondent's argument. Without this argument Respondent would have to concede that it was responsible for making changes to the plan and thereby violated the Act.

> GC COUNSEL: Okay. Do you recall when that occurred?
> ZILBAUER: Specifically, no.
> GC COUNSEL: It was obviously prior to - was it prior to the June profit sharing payments?
> ZILBAUER: Yes.
> GC COUNSEL: Okay. So was that change he was referring to, that was going to impact the June profit sharing payments?
> ZILBAUER: Yes.

(Tr. 466). This testimony establishes that Zilbauer knew there was going to be a change to the June profit-sharing payments before the payment was made. When asked if he called the Union after learning about the change he simply testified "No." (Tr. 467). There is no record evidence to refute this statement; there is no evidence that Respondent notified the Union, because it did not. Upon questioning from the ALJ, Zilbauer even identified the "union situation" as the reason for the change to the employees' profit-sharing plan. (R. Exc. 88; Tr. 467). A "union situation" which was exaggerated by Laporte's unfounded allegations that the Union posted a "hurtful" flyer. (Tr. 352; R. Exc. 40, 46). Indeed, the ALJ was correct to conclude that Respondent's corporate office would have had no reason to retaliate against only[8] Respondent's facility if not for the reports of its supervisors. (R. Exc. 89).

Respondent further excepts to the ALJ's finding that employees received at least $1,000 less than they should have due to the changes in the profit-sharing plan and that Respondent presented no evidence to refute that information. (R. Exc. 49, 56). Namely, employees Reed and Cracknell both testified that they expected about a thousand more dollars than they received. (Tr. 177, 222). Respondent failed to comply with the General Counsel's subpoena, which would have illustrated exactly how much money this plan change cost the employees. (See supra Part II.C).

[8] Pozzobon told to employee Reed that only the Niagara facility was impacted by these changes. (Tr. 219-21).

Regardless, a thousand dollars is a substantial reduction, and Respondent failed to present any evidence to refute the witness testimony on this fact. (R. Exc. 126).

As recounted above, the cumulative record evidence, including the testimony of Cracknell, Reed, and Zilbauer, all supports the ALJ's finding that a substantial change was made, that these changes are based on employment-related factors, that Respondent had some control over the payments, and it failed to notify or bargain with the Union. (R. Exc. 82, 86, 88, 128). For the foregoing reasons, Respondent's fact-based exceptions must be dismissed.

2. *Respondent's profit-sharing plan is a term and condition of employment, not a gift (Exceptions 129, 131-33, 135-38)*

Respondent disputes that it views the profit-sharing payments as "a gift" to employees (R. Exc. 16), while simultaneously arguing that the ALJ inappropriately rejected its "gift" defense. (R. Exc. 129, 131, 133, 135). Respondent also heavily relies on the inapplicable Bob's Tire Co. case to support its argument that the profit-sharing payment plan was a "gift" to employees rather than a term and condition of their employment. (R. Exc. 132, 136-38). Bob's Tire Co., 368 NLRB No. 33 (2019). Based on the facts of this case, Respondent's gift defense is not supported by Board law and exceptions arguing its validity must be dismissed.

The ALJ correctly rejected Respondent's defense that the profit-sharing payments were just "gifts" to employees, rather than a term and condition of their employment. As the ALJ explains, "[t]he Board has repeatedly affirmed that profit-sharing, as a matter of law, is a mandatory subject of bargaining." (ALJD 26:2-3, citing J.P. Stevens & Co., Inc., 239 NLRB 738, n.3 (1978); Western Foundries, Inc., 233 NLRB 1033, 1037-38 (1977); Sunshine Food Markets, 174 NLRB 497, 504 (1969)). While admitting that "these cases are dispositive of the issue," the ALJ goes on to explain how the record demonstrated that these payments constituted a significant portion of employees' compensation (about 21 percent, on average) and that the payments

incorporated work-related factors. (ALJD 26:6-18). Thus, Respondent has no viable defense that the profit-sharing payments were merely "gifts" to employees.

Regardless, Respondent continues to rely on the inapplicable Bob's Tire Co. case. 368 NLRB No. 33. (R. Exc. 132, 136-38). In that case, the Board found that there was insufficient evidence to show that holiday bonuses were terms and conditions of employment. Bob's Tire Co., 368 NLRB No. 33, slip op. at 1. Indeed, the ALJ extensively analyzed and rejected this argument, and Respondent presents nothing new. (ALJD 26: fn. 26). In his recitation, the ALJ notes that, unlike Bob's Tire Co., the record shows the amount of the profit-sharing payments from 2016-2018, that these were substantial payments, and that the payments were tied to employment-related factors. (ALJD 26: fn. 26). This, in addition to the fact that profit-sharing as a matter of law is a mandatory subject of bargaining, makes Respondent's argument moot and these exceptions should be dismissed.

3. *Respondent was responsible for making changes to the profit-sharing payment plan (Exceptions 140-41)*

The ALJ correctly rejected Respondent's unsubstantiated claims that it was "not responsible" for changes to the profit-sharing payments. (R. Exc. 140-41). As the ALJ aptly states, this argument is "not persuasive." (ALJD 27:3). Importantly, Pozzobon admitted that this adjustment was only happening at Respondent's facility. (Tr. 219-21). In addition, as was previously discussed, Respondent repeatedly told employees that the changes were happening because of the "union." (Tr. 142, 154-56, 179, 198). Zilbauer even identified union activity as the reason for the change to the employees' profit-sharing plan. (Tr. 426, 466-67). Zilbauer also admitted responsibility for determining what employees receive as part of their payment. (Tr. 425). The ALJ also extensively discredited Respondent's witness, Laporte, so Respondent is unable to rely on his testimony that the changes were simply out of Respondent's control. (See supra Part

II.B). As a result, Respondent cannot credibly argue that it had no control over the changes to the profit-sharing payment plan.

4. *Respondent's anti-union animus induced it to make the profit-plan sharing payment changes (143-45, 147-50)*

As was discussed previously, Respondent demonstrated pervasive anti-union animus that colored its unlawful actions. Yet, Respondent unsuccessfully claims the General Counsel failed in meeting its Wright Line burden (R. Exc. 143, 149), that Respondent harbored no animosity toward the Union (R. Exc. 144, 150), that union activity wasn't the reason for the changes (R. Exc. 145), and that the timing fails to support a finding of unlawful motive (R. Exc. 147, 148). Wright Line, 251 NLRB 1083 (1980). And again, the record is replete with animus. (See supra Part II.E.2).

Respondent's witnesses repeatedly broadcast that it changed the profit-sharing plan because of the Union. Pozzobon specifically told employees that the Union was to blame for the change in the profit-sharing plan. (Tr. 142, 154-56, 179, 198). Zilbauer even identified union activity as the reason for the change to the employees' profit-sharing plan. (Tr. 426, 466-67). Respondent's own admissions prove that it changed the plan due to its anti-union animus.[9]

As for timing, Respondent made the decision to stop sharing profit information with employees on April 29, just three days after the election. (R. Exh. 6). This decision to stop sharing profit information was necessary to reduce profit-sharing payments. Indeed, Respondent ceased

[9] Anti-union animus can be established without resorting to the countless other examples in the record. For example, Respondent admitting that its decision to stop posting profit information was related to the Union election. (R. Exh. 6). Laporte's statement to Cracknell that the involvement of a "third-party" prevented Respondent from sharing profit information fully supports a finding of animus and can be interpreted no other way. (Tr. 151). Or Laporte's statement to Reed that the Union could not be trusted with important information also supports a finding of animus. (Tr. 224). Laporte openly testified that he did not like unions, and, when the flyer emerged immediately blamed the Union despite making no effort to investigate whether the flyer even came from the Union. (Tr. 347-49, 352, 374-76).

sharing the information so that employees would not know that their payments had been reduced. Zilbauer admitted that he knew before the June payments were issued that there had been a change. (Tr. 466).

For the foregoing reasons Respondent's exceptions related to animus should be dismissed.

G. The ALJ appropriately found that Respondent violated Section 8(a)(1) and (5) of the Act when it failed to provide the Union with the information it requested (Exception 170)

The last profit-sharing related violation arises out of Respondent's refusal to provide the Union with information it requested about the profit-sharing payment plan. Respondent excepts to the idea that the profit-sharing plan is a term and condition of employment, and therefore a mandatory subject of bargaining. (R. Exc. 170). In its brief, Respondent summarily disposes of the ALJ's findings by asserting that because the profit-sharing plan was not a mandatory subject of bargaining (and one that Respondent did not control) it could not have violated the Act by failing to provide the information. (R. Br. 41). Unfortunately for Respondent, it neither established that it lacked control over the profit-sharing plan, nor that it was a nonmandatory subject of bargaining. (See supra Part II.F). As discussed previously, the ALJ correctly took an adverse inference against Respondent regarding this issue. (See supra Part II.C).

Moreover, Respondent's assertion that the Union's requests were irrelevant because it was able to make bargaining proposals, brazenly contradicts established Board law. The question is not whether a Union can limp forward with its hands tied in bargaining without the information it requested. Rather, "[w]here the Union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant, and the Respondent must provide the information." Disneyland Park, 350 NLRB 1256, 1257 (2007). Respondent has provided no evidence that changes the relevance of the Union's request. There is no dispute that the profit-

sharing plan directly and significantly impacted employees' compensation. (J. Exh. 2). Thus, Respondent's exception 170 should be dismissed.

H. The ALJ properly concluded that Respondent's layoff violated Section 8(a)(1) and (5) of the Act (Exceptions 9, 99-110)

Respondent also violated the Act when it unilaterally laid off employees. Respondent's exceptions to the ALJ's decision regarding the layoff can be easily divided into three groups: 1) purely factual disputes (R. Exc. 9, 101, 109), 2) the ALJ's rejection of Respondent's defenses (R. Exc. 107), and 3) Respondent's general objections about the inadequate notice it provided the Union (R. Exc. 99-100, 102-06, 108, 110).[10] All three necessarily fail based on the credible record evidence and applicable case law.

1. *There is no basis in the record to overturn the layoff facts that Respondent disputes (Exceptions 9, 101, 109)*

Respondent takes exception to facts that are irrefutably present in the record. First, Respondent excepts to its own witness' testimony. (R. Exc. 9). Respondent asserts that the ALJ was wrong when he said that Zilbauer testified that the decision to impose layoffs had already been made when it notified the Union. (R. Exc. 9; ALJD 4:14-16). Unfortunately for Respondent, that is precisely Zilbauer's testimony. In discussing the email sent to the Union notifying it of the layoff (GC Exh. 15) Zilbauer testifies:

> GC COUNSEL: So the decision had already been made to lay the employees off at that point?
> ZILBAUER: Well, the way I would phrase it is we knew we needed to do a layoff because of market down, yes.
> GC COUNSEL: So yes, the decision had been made to lay off the employees at that point?
> ZILBAUER: I don't recall if we announced it, but we were planning to do a layoff.

[10] As always, Respondent also objects to the ALJ's conclusions, but those exceptions are addressed at the end of this Answering Brief. (See infra Part II.J).

(Tr. 252). Shortly thereafter, the witness again confirms that Respondent planned to do the layoff before the Union was notified. (Tr. 253). Despite Zilbauer's attempts to evade the question, he repeatedly admits that the decision to lay off employees had already been made by the time the Union was notified. Respondent's attempt to emphasis the word "planning" is incompatible with the context of Zilbauer's testimony. (R. Br. 46). Thus, this exception must be dismissed.

Similarly, Respondent contests the ALJ's factual finding that no witness testified that Respondent would have been willing to bargain with the Union prior to the layoff. (R. Exc. 101, 109). Respondent is unable to cite to any portion of the record where such testimony exists. (R. Br. 11-12). Respondent relegates its support of this exception to a short footnote claiming that its witnesses were never asked the question. (R. Br. 47, fn. 45). However, that does not make the ALJ's statement any less true.

Respondent never expressed any willingness to bargain with the Union. The memorandum the Union received after the close of business on May 14, stated that starting May 20, Respondent "**will** begin a two week market down that **will** cause some bargaining unit employees to be temporarily laid off." [Emphasis added]. (GC Exh. 15). It concludes "As a result, a total of approximately 19 employees **will** be laid off during the first week of the shutdown, and a total of approximately 18 employees **will** be laid off for the second week of the shut down." [Emphasis added]. (GC Exh. 15; ALJD 21:16-17). As the ALJ correctly identifies, the memorandum contains no language suggesting any willingness to bargain or that the layoff was a proposal. (ALJD 21:17-19). Importantly, there is no testimony in the record that refutes the language in the memorandum. Thus, as Respondent provided no evidence to refute the ALJ's finding, these exceptions should be dismissed.

2. *Respondent's defense that the Union failed to bargain has no basis in fact or law (Exception 107)*

Respondent argues that the Union waived its right to bargain over the layoffs and that the ALJ was wrong to reject this defense. (R. Exc. 107, R. Br. 47). Respondent supports this argument by claiming that the Union did not respond to its letter or make itself available to bargain in a "timely fashion." (R. Br. 47). It complains that the Union responded by letter rather than by email, and that the dates the Union provided were after the layoff had begun. (R. Br. 47). The inanity of this defense is demonstrated by the record.

The Union replied to Respondent's memorandum and requested bargaining merely two days after learning of the predetermined layoffs. (GC Exh. 2). It did so by formal letter given the seriousness of Respondent's plan and the impact it would have on many members of the newly certified bargaining unit. Yet, Respondent objects to the method by which the Union replied and believes that by doing so it can avoid a violation. Ironically, had Respondent provided the Union with adequate notice, a response sent by regular mail would have reached it well before the layoff was set to begin. Thus, this defense must necessarily fail.

In its response, the Union demanded that Respondent cease and desist with the layoffs, requested decisional and effects bargaining, and provided bargaining dates. (GC Exh. 2). Respondent now defends itself by claiming those bargaining dates were too late, and the Union failed to meet its bargaining obligation. This defense is comical given that it never responded to the Union's request, expressed concern over the bargaining dates, or proposed alternative dates. (Tr. 36, 365-66). Indeed, Respondent wholly ignored the Union's bargaining request and laid off the employees. (Tr. 36, 365-66, 454). Thus, this defense must also fail and exception 107 should be dismissed.

3. *The ALJ appropriately found that Respondent failed to provide the Union adequate notice and an opportunity to bargain over the layoff (Exceptions 99-100, 102-06, 108, 110)*

The ALJ correctly found that it was Respondent, not the Union, which neglected its bargaining obligation in violation of Section 8(a)(1) and (5) of the Act. Respondent either misunderstands, or hopes the Board misunderstands, the meaning of *fait accompli*. (R. Exc. 99, 100, 110). But even if its memorandum notifying the Union of the impending layoff was not a foregone conclusion, the notice Respondent provided was insufficient and untimely. (R. Exc. 102-106, 108).

The record makes clear that Respondent's notice was a mere courtesy informing the Union of what it had already decided. As was already discussed, the memorandum the Union received stated that Respondent "**will** begin a two week market down that **will** cause some bargaining unit employees to be temporarily laid off." [Emphasis added]. (GC Exh. 15). It concludes "As a result, a total of approximately 19 employees **will** be laid off during the first week of the shutdown, and a total of approximately 18 employees **will** be laid off for the second week of the shut down." [Emphasis added]. (GC Exh. 15; ALJD 21:16-17). Nothing in the memorandum contains language suggesting that the layoff was up for discussion. (ALJD 21:17-19). Similarly, there was no testimony that Respondent intended to bargain. In fact, when the Union proposed bargaining and supplied dates Respondent never responded. (Tr. 36, 365-66, 454). When viewed as a whole, the record reveals that Respondent had no intention of bargaining with the Union.

Even if Respondent's notice was not a mere announcement of a foregone conclusion, it was insufficient and untimely. The ALJ correctly applies the law here. Respondent was obligated to provide the Union with details about the layoff, like who had been selected and how they had been chosen. (ALJD 22:14-25, citing The Washington Post Company, 237 NLRB 1493, 1498 (1978)). These details would be necessary if Respondent intended to engage in bargaining, which,

the facts show it did not. Similarly, Respondent's less than six-day notice did not give the Union enough time to engage in meaningful bargaining. The Board has found that even a 20-day notice before implementation was insufficient. (ALJD 22:3-4). Pontiac Osteopathic Hospital, 336 NLRB 1021, 1022-24 (2001).

Thus, all of Respondent's exceptions regarding the layoff should be dismissed.

I. The ALJ correctly found that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally subcontracting bargaining unit work (Exceptions 7, 92-93, 112, 115-123)

In addition to the above violations, Respondent also violated the Act when it subcontracted out janitorial work without notifying or bargaining with the Union. Unsurprisingly, Respondent submits a variety of exceptions that all take issue with the ALJ's conclusion. Some of the exceptions relate to the ALJ's factual findings (R. Exc. 7, 92-93, 118) while others take issue with the ALJ's rejection of Respondent's defenses (R. Exc. 115-23). As the ALJ's conclusions were based on the credible record evidence, as discussed below, these exceptions should all be dismissed.

1. *Respondent has no basis to overturn established facts (Exceptions 7, 92-93, 118)*

First, the ALJ's factual findings relating to the subcontracting of the bargaining unit work were based on the credible record evidence. Exception 7 takes issue with the concept that the janitor was in the bargaining unit. (R. Exc. 7). This fact is undebatable and easily proven. The parties agreed that the custodian was eligible to vote in the April 2019 election and he was included on the list of eligible voters. (Tr. 53-54, 369; GC Exh. 8). Indeed, at no time before, during, or after the election did Respondent challenge the custodian's eligibility to vote in the election or his inclusion in the unit. (Tr. 54-56; GC Exh. 8, 9). The ALJ correctly quotes the unit description in

his decision, which does not exclude the custodian. (ALJD 3:fn 1). Thus, Respondent has no basis for claiming the janitor was not in the unit.

Exception 92 objects to the wording of the ALJ's factual determination that Respondent's unit janitor (who cleaned the production and maintenance areas before his departure from the company) and Respondent's outside contractor (that cleaned the offices) "'occasionally' substituted for one another." (R. Exc. 92). However, the facts in the record clearly support that conclusion. The record reveals that the unit custodian works in the front office area only when the third-party service is on vacation, and vice versa. (Tr. 183, 185, 370-72, 383, 459). In total, the exchange happened only a few weeks a year. (Tr. 370-72, 409-10). A few weeks, out of a 52-week year, is certainly "occasionally."

Exception 93 objects to the ALJ's finding that the Union was willing to discuss substituting the janitor unit position for a new position, but that the status quo had to be restored first. (R. Exc. 93; correctly found on ALJD 24). The credible record evidence reveals this is precisely what occurred. Indeed, this proposal was reduced to writing. (GC Exh. 11-12).

Respondent's last factual issue concerns the ALJ's finding that Respondent's decision to subcontract the janitorial work in the production and maintenance area was a "substantial expansion" of its use of contractors. (R. Exc. 118). This issue of semantics is not only tiresome but unsupported by the record or the law. The use of the word substantial in this circumstance is appropriate given the underlying case law supporting the conclusion. The Board has held that Respondent must bargain when it "**substantially** increases or expands the use of contractors to perform bargaining unit work even if it had subcontracted to some degree in the past." [emphasis added] (ALJD 24:13-17); O.G.S. Technologies, Inc., 356 NLRB 642, 645-46 (2011). Here, Respondent went from never contracting out the production and maintenance side janitorial work

to removing the bargaining unit position and contracting it out full-time. (Tr. 183, 185, 370-72, 383, 409-10, 459). That, under the law, is a "substantial expansion" and the ALJ appropriately described it as such. Accordingly, Respondent's exceptions to the ALJ's factual findings relating to janitorial work should be dismissed.

2. *The ALJ appropriately rejected Respondent's baseless defenses (Exceptions 115-123)*

Next, Respondent takes issue with the ALJ's rejection of its defenses. (R. Exc. 115-123). Exception 115 is that of a general gripe that the ALJ did not indulge Respondent's defenses. This exception should be dismissed as it does not address any specific issue with the ALJ's conclusion, other than the fact the conclusion was reached at all.

Exceptions 116 and 117 address Respondent's "past practice" of declining to fill vacancies argument. Respondent insists that because Respondent did not always fill open positions it could do as it wished with respect to the unit janitorial position. As the ALJ stated in his decision, this argument "wholly misses the point." (ALJD 23:40-42). Under the law, failing to fill a unit position is entirely different from filling that unit position with a subcontractor. Indeed, unilaterally filling a unit position with a subcontractor violates the Act, as the ALJ ultimately concluded. Thus, exceptions 116 and 117 should be dismissed.

Exceptions 119, 120, and 121 address Respondent's rejected argument that it was under no obligation to bargain over the janitorial subcontracting because the change altered its basic operation. In doing so, Respondent relies on the Supreme Court's decision in Fibreboard Corp. 379 U.S. 203 (1964). As the ALJ correctly identifies, Respondent's business is that of a paper manufacturer, and reminds Respondent that replacing a unit janitor with a subcontractor did not alter its basic operation such that its obligation to bargain under the Act would be relieved. (ALJD 24:22-39).

The last exceptions addressing Respondent's defenses claims that the ALJ incorrectly rejected its argument that the Union failed to bargain in good faith because it insisted on restoring the status quo. (R. Exc. 122 and 123). Again, the ALJ correctly decided that, under Board law, the status quo should be restored. (ALJD 24:41-43; 25:1-16). O.G.S. Technologies Inc., 356 NLRB at 647; Brooks Inc., 251 NLRB 757, 764 (1980), enfd. 682 F.2d 874 (10th Cir. 1982). Failing to restore the status quo rewards Respondent for its unlawful actions by giving it significant bargaining power over the Union. For the foregoing reasons the ALJ correctly rejected Respondent's defenses to its unlawfully subcontracting bargaining unit work and these exceptions should be dismissed.

J. Exceptions which do not comport with the Board's Rules and Regulations should also be disregarded (Exceptions 8, 97-98, 111, 113-14, 124-25, 127, 142, 151, 169, 171-201)

Respondent excepts individually to every component of the ALJ's conclusions of law, remedies, and Order. In its exceptions, Respondent merely restates the ALJ's conclusions but fails to make any argument in support of its exceptions to them. Rather, these exceptions are solely based on Respondents' arguments that the underlying findings are in error. Because the ALJ's underlying findings were correct, Respondent's exceptions necessarily must fail. Moreover, as many of these exceptions fail to state with any degree of specificity why these findings and conclusions are exceptionable, these exceptions are contrary to Section 102.46(b)(1) of the Board's Rules and Regulations. Specifically, exceptions 172-201 do not comply with these requirements, and the General Counsel urges the Board to disregard them. See Section 102.46(b)(2) of the Board's Rules and Regulations; Fuqua Homes (Ohio), Inc., 211 NLRB 399, 400 fn. 9 (1974).

K. As none of Respondent's exceptions alter the ALJ's conclusions, the Board's final order should require Respondent to produce appropriate W-2 forms to the Regional Director

Counsel for the General Counsel respectfully requests that the final Board order in this matter specifically require Respondent to produce appropriate W-2 forms to the Regional Director. In Tortillas Don Chavas, 361 NLRB 101 (2014) the Board explained that allocating backpay to the appropriate earnings periods for Social Security Administration (SSA) purposes is consistent with the Board's make-whole remedial power and established SSA allocation as a standard remedy.[11] In AdvoServ of New Jersey, 363 NLRB No. 143 (2016), for the purposes of effective administration of the remedy the Board modified the remedy to require respondents to file reports allocating backpay (reports) with the Regional Director, rather than directly with SSA. Id. at 1. The reports are transmitted to SSA annually in April/May. However, the Board also observed that SSA would not accept such reports prior to its receipt of the affected employees' W-2 forms. Id.

The General Counsel herein requests that, in support of effective administration of the SSA-allocation remedy specified in Tortillas Don Chavas, that the Board order require Respondent to submit appropriate W-2 forms to the Regional Director, in addition to the SSA reports. This will allow the Region, in effectuating compliance, to compare the information on the W-2 forms and the SSA reports to ensure accuracy and consistency between the two. Experience has demonstrated that SSA will not credit earnings or otherwise process SSA reports Regional Directors forward before engaging in this process themselves, and problems associated with information inconsistent

[11] The Board has observed followed this practice since the decision in Latino Express, 359 NLRB 518 (2012), a decision rendered at a time when the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, as the Supreme Court held those appointments to be in NLRB v. Noel Canning, 134 S.Ct. 2550 (2014). Accordingly, the Board's decision in Tortillas Don Chavas was to "continue" the remedy of requiring SSA reports, and for the reasons stated therein.

due to error or incorrect documentation has led to lower SSA benefits than those to which some employees would be otherwise entitled. See General Counsel Memorandum 20-02 Requiring Respondent to produce the appropriate W-2 forms to the Regional Director will enable Regional personnel to ensure the reports are correct prior to submission to SSA, and thus avoid the problems and inconsistencies in those documents that may lead to difficulties with correct SSA allocation.

The Board ordinarily orders respondents to preserve and, where good cause is shown, provide information to the Regional Director, including payroll records, SSA payment records, timecards, and other personnel records necessary to analyze backpay due under the terms of its orders. See Ferguson Electric Co., 335 NLRB 142 (2001). Ordering respondents to provide W-2 forms in cases involving backpay requires a minimal effort on their part, especially given that they are providing them to SSA already, yet doing so will significantly aid the Regions' administrative effectuation of the Board's remedy in the compliance stage.

In sum, ordering Respondent to provide the Regional Director with appropriate W-2 forms serves the goal of ensuring accuracy in the reports and allows Regional personnel to identify any inaccuracies or inconsistencies before problems arise in this connection at SSA.

III. CONCLUSION

For the reasons set forth above, General Counsel respectfully requests that the Board deny Respondent's Exceptions to the Administrative Law Judge in their entirety.

DATED at Buffalo, New York, this 18th day of May 2020.

Respectfully submitted,

/s/ Jessica L. Cacaccio

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